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April 2, 2010

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Via Electronic Mail – jking@water.nv.gov
Jason King
Acting Nevada State Engineer
901 South Stewart Street, Suite 2002
Carson City, Nevada 89701

**Re: Nevada State Engineer Workshop Concerning
Great Basin Water Network Case
Our File No. 9476.0030**

Dear Mr. King:

The Truckee Meadows Water Authority has reviewed all of the comments posted on the Nevada Division of Water Resources web page regarding the referenced matter. It has also reviewed the seven suggestions which have been made for possible legislative changes. Those seven suggestions are labeled Versions 1-6 on the Nevada Division of Water Resources web page. The seventh suggestion is set forth in the letter to you from Michael J. Van Zandt.

For the reasons stated in my letter to you dated March 15, 2010, in my statement at the March 16 workshop and in my letter to you dated March 26, 2010, Truckee Meadows Water Authority continues to believe that the best way to address the instability and uncertainty created by the Great Basin Water Network case is to deal directly with the statute that decision misinterpreted. The legislative language which the Truckee Meadows Water Authority has proposed, Version 1, and the language which Michael Van Zandt has proposed each do that and the Truckee Meadows Water Authority supports either version.

Comments on Versions 2 Through 6

I will briefly comment on the other suggestions for legislative changes and explain why the Truckee Meadows Water Authority does not support those suggestions. I will address each by their "Version" number.

Version 2

The proposed addition of a new N.R.S. 533.370(3) places language into the body of the statute which really belongs in the transitory provisions of any legislative changes. In addition, the language is somewhat confusing, particularly as to the status of applications filed after July 1, 2003, which were not acted upon within one year and which do not meet the requirements of Section 2 for postponement of action. In light of the fact that the Supreme Court in the Great Basin Water Network case did not mention the provisions added in 2003, which are now N.R.S. 533.370(4), this proposed change may further complicate, rather than clarify, the situation.

This Version 2 and Versions 3 and 4 in some way or another all propose a change which would retroactively require that applications filed after January 1, 1947 for "interbasin transfers of groundwater" in excess of 250 acre feet be noticed anew. To the extent that the suggestions are primarily designed to preserve the result reached in the Great Basin Network case for the litigants there, there should be a more direct way to do that. Moreover, these suggested changes will create some confusion.

First, the phrase "interbasin transfer of groundwater" was added to Nevada's water law in 1999. However, there may have been applications filed after January 1, 1947 and before 1999 which fit the definition. Would this provision apply to such applications, if any?

Second, a number of the proposed legislative changes, this one included, assume that the 1947 amendment to Nevada's water law which added the provision about action within one year would be construed as not applying to applications filed before January 1, 1947 (or the effective date of that statute, March 31, 1947). In my judgment, the 1947 amendment does apply to applications then on file in a prospective manner. In other words, the one year clock for applications pending on March 31, 1947, started to tick on that day.

The addition of what is proposed to be N.R.S. 533.370(9)(e) potentially requires the renoticing of applications which have been approved or rejected, but which are presently the subject of some judicial review proceeding. I do not know whether there are any applications which actually fit that description, but it is unfair and inappropriate to require such applications to be renoticed even if the issues raised in the Great Basin Network case were not raised in those cases.

Version 3

The new language proposed by Version 3 for N.R.S. 533.370(4) also inserts transitory language into the body of the statute. However, that language does achieve what is intended by Truckee Meadows Water Authority Version 1 and the Van Zandt language.

Version 3 would also amend N.R.S. 533.370(8)(d). In our judgment, any amendments to N.R.S. 533.370 not directly affected by the Great Basin Water Network decision should be left for a regular session of the legislature.

Our concerns with the proposed new N.R.S. 533.370(8)(e) are the same as the concerns expressed above as to Version 2 and subsection 9(e). The suggested language could require the renoticing of applications which are presently under judicial review even if there was no issue in that proceeding like those involved in Great Basin Water Network.

Version 4

The new language suggested by Version 4 in N.R.S. 533.370(4) will create additional confusion. First, it suggests that applications filed before January 1, 1947, and not acted upon within one year did not remain active and therefore must be refiled. Alternatively, the suggested change assumes that the 1947 legislative change requiring action within one year does not apply to applications filed before 1947. As noted above, I believe the better interpretation is that after the 1947 amendment, the State Engineer had one year to act on all applications that had been filed prior to 1947 and not acted upon within one year. Moreover, the language leaves open what is to happen to applications filed after July 1, 2003, which have not been acted upon within one year and which do not meet the requirements for postponement of action under 533.370(2). Finally, the general exception for applications that are the subject to any pending appeal apparently would mean that an application filed between January 1, 1947, and July 1, 2003, which had been acted upon but which was the subject of a pending appeal would not remain active and therefore would be subject to a requirement of renoticing. Truckee Meadows Water Authority is the real party in interest as to at least one change application which fits that description.

Changes to N.R.S. 533.370(8)(d) should be addressed in a regular session of the legislature and not in connection with the special issues presented by the Great Basin Water Network decision.

The proposed new language for subsection 8(e) will also create confusion. It seems to require renoticing of an application for interbasin transfer of groundwater filed with the State Engineer after January 1, 1947, which had not been acted upon within 7 years, even if the application was acted upon, but after 7 years had elapsed.

Version 5

Version 5 proposes to move the substance of N.R.S. 533.370(4) and to a new N.R.S. 533.370(2)(d), but using slightly different language. A major problem with this suggested change is that it uses the word "pending," but does not deal directly with the Supreme Court's erroneous interpretation of the term "pending" in the Great Basin Water Network case. The language added in Sections 2 and 3 of this version is also confusing. I am particularly concerned about Section 3 and its reference to the applications pending prior to 2007.

Version 6

Jason King
Acting Nevada State Engineer
April 2, 2010
Page 4 of 4

Changes like those proposed in Version 6 in N.R.S. 533.370(2) should be considered in a general legislative session and not at this time in connection with the Great Basin Water Network decision. Moreover, Version 6 does not in any way address the critical issues raised by the Great Basin Water Network case.

Conclusion

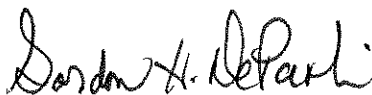
The Truckee Meadows Water Authority continues to believe that uncertainty and instability created by the Great Basin Water Network decision should be addressed in a special legislative session. Version 1 and the Van Zandt version best address the problems created by that decision. However, the Truckee Meadows Water Authority is willing to work with the proponents of Version 3 to arrive at a single proposal that those who favor legislative action can support.

It does not appear that Advocates for Community and Environment, the law firm representing Great Basin Water Network and other petitioners in that case, have presented any specific suggestions for your consideration. I also assume that the parties to that case have not reached an agreement allowing for the renoticing of applications involved there. Although I do not know whether legislative approval of Version 1, or the Van Zandt proposal, would change the **result** in the Great Basin Network case, it seems to me the best way to preserve that **result**, but not the rationale for it, is to add some language to Section 3 of Version 1 or the Van Zandt proposal as follows:

"This act becomes effective upon passage and approval, and applies retrospectively as well as prospectively, but is not intended to change the result reached by the Supreme Court of the State of Nevada in that certain action entitled Great Basin Network, et al. v. Tracy Taylor, et al., Case No. 49718."

Thank you for the opportunity to provide comments on this important matter.

Sincerely,


Gordon H. DePaoli

GHD:hd

cc: Mark Foree (mforee@tmwa.net)
John Erwin (jerwin@tmwa.net)
Steve Walker (stevewalker@gbis.com)
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